MOTION FILED
JUL 19 1993

No. 92-1839

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLGATE-PALMOLIVE COMPANY,
Petitioner,
v.
FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California In and for the Third Appellate District

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR COMMITTEE ON STATE TAXATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Committee on State Taxation and the Chamber of Commerce of the United States of America (collectively "*amici*") hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of *amici* in this case arises from the fact that many of their members are U.S.-based multinational corporations subject to California's taxing method at issue in this case. These members would be directly affected by the discriminatory taxing scheme that would result if this Court found worldwide combined reporting unconstitutional as applied to foreign-based taxpayers but not as applied to U.S.-based taxpayers.

California's use of the worldwide combined reporting method of taxation has been the cause of considerable international controversy. Indeed, the United Kingdom has announced that it will take direct retaliatory measures against U.S.-based multinationals by the end of the year if the problem of worldwide combined reporting as applied to foreign-based multinationals is not resolved. Many of *amici's* members will be directly affected by this retaliation.

Amici are confident that this Court will take the necessary steps to prevent this retaliatory legislation from becoming effective by granting the petition for *certiorari* in the case challenging the constitutionality of worldwide combined reporting as applied to a foreign-based multinational group. *See Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 2 Cal. 4th 708, 8 Cal. Rptr. 2d 31, 829 P.2d 279 (1992), *on remand*, 11 Cal. App. 4th 1678a (3d Dist. 1992), *petition for cert. filed sub nom. Barclays Bank PLC v. Franchise Tax Bd.*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384). In seeking to resolve this problem, however, *amici* are concerned that its U.S.-based members may become victims of an even greater problem. For if the constitutionality of worldwide combined reporting is reviewed solely in the context of a foreign-parent multinational group, there is a real danger that a discriminatory taxing scheme will be created whereby worldwide combined reporting is declared unconstitutional as applied to a foreign-based group, but not as applied to a U.S.-based group.

Although petitioner Colgate-Palmolive Company raised the issue of the unconstitutionality of the taxing scheme that would result from worldwide combined reporting applying only to U.S.-based multinationals, the complexity of the other issues being raised in this case prevented this argument from being completely developed in the petition for writ of *certiorari*. *Amici* request permission to file a brief that will contain a more detailed discussion on this issue. In particular, on behalf of their members, *amici* wish to stress to this Court the broad-based implications of such a discriminatory taxing scheme both in terms of the damage to competitive balance for U.S.-based businesses and the violation of the free trade principles of the Commerce Clause.

Respectfully submitted,

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BRIEF FOR THE COMMITTEE ON STATE TAXATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The *amici curiae* are organizations representing a wide spectrum of U.S. business interests, including both U.S.-based multinational companies and foreign-based multinational companies. The Committee on State Taxation (hereafter "COST") is a non-profit association originally organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. On January 1, 1992, COST was separately incorporated and currently has a membership of over 380 major multistate corporations, engaged in interstate and international business. The Chamber of Commerce of the United States of America

(hereafter the "Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents approximately 215,000 businesses and organizations and serves as a major voice of the American business community.

The interest of the *amici* in this case arises from the fact that many of their members are U.S.-based multinational corporations subject to California's taxing method at issue in this case. While the petitioner in this case (hereafter "Colgate") is challenging California's use of the worldwide combined reporting method of taxation on behalf of U.S.-based taxpayers, the petitioner in *Barclays Bank Int'l, Ltd. v. Franchise Tax Bd.*, 2 Cal. 4th 708, 8 Cal. Rptr. 2d 31, 829 P.2d 279 (1992), *on remand*, 11 Cal. App. 4th 1678a (3d Dist. 1992), *petition for cert. filed sub nom. Barclays Bank PLC v. Franchise Tax Bd.*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384), is challenging that same method of taxation on behalf of foreign-based taxpayers. *Amici* filed briefs as *amici curiae* in the *Barclays Bank* case, supporting the petitioner's challenge to California's use of worldwide combined reporting. Because *Barclays Bank* involves only a foreign-based multinational taxpayer, *amici's* U.S.-based multinational members would be directly affected by the discriminatory taxing scheme that would result if this Court found worldwide combined reporting unconstitutional only as applied in *Barclays Bank*.

In addition, each of the *amici* is committed to principles of free trade in both domestic and foreign commerce. In this regard, it is the objective of each of the *amici* to preserve and promote equitable and non-discriminatory state and local taxation of multijurisdictional business entities. *Amici* therefore have a strong interest in ensuring that U.S.-based multinationals are treated the same as foreign-based multinationals in the challenge to California's use of the worldwide combined reporting method

of taxation. *Amici* are concerned that, if U.S.-based taxpayers are not treated the same as foreign-based taxpayers, the competitiveness of U.S. industry and the U.S. economy will be seriously impaired. Moreover, U.S.-based companies will be discouraged from investing abroad, thereby impeding the very principles of free trade that *amici* are committed to protect. *Amici* believe that, if this Court decides to review whether worldwide combined reporting is unconstitutional as applied to foreign-based taxpayers, then the petition for *certiorari* must be similarly granted in this case in order to avoid these undesirable consequences.

The consent of the attorney for the petitioner has been obtained for the filing of this brief. The consent of the attorney for respondent has been requested but refused. A motion for leave to file this brief is attached.

SUMMARY OF THE ARGUMENT

I. It is the "very purpose of the Commerce Clause . . . to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In upholding this purpose, the Court has consistently intervened to prevent discriminatory treatment of "protected commerce," whether foreign or domestic. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Finance*, 112 S. Ct. 2365 (1992). This fundamental precept of Commerce Clause analysis will be violated if this Court finds worldwide combined reporting unconstitutional as applied to foreign-based taxpayers but not as to U.S.-based taxpayers. Such a discriminatory taxing scheme would discourage outbound U.S. investment, thereby impeding the very free flow of trade that the Commerce Clause was designed to protect.

The sensitivity of this Court to discriminatory taxation has been particularly acute in the context of foreign com-

merce. *See Kraft,* 112 S. Ct. at 2370; *see also Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). This broader protection from discriminatory taxation emanates from the realization that a single state's interference with "foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole." *Kraft,* 112 S. Ct. at 2370. The discriminatory scheme that would be created if worldwide combined reporting were constitutionally prohibited only as applied to foreign-based taxpayers would affect the United States as a whole, damaging its credibility and standing as a nation committed to free trade and fair dealings in international commerce.

In addition to constitutional consequences, this issue also has serious consequences for the foreign and economic policy of the federal government. The longstanding policy of ensuring a level playing field for U.S.-based businesses in the international marketplace will be jeopardized if the Court grants the petition in *Barclays* but not in this case.

II. The petitioner in this case and the petitioner in *Barclays* raise exactly the same question as to whether Congress can consent to California's use of worldwide combined reporting by remaining silent. Indeed, the five items of inaction found by the California Supreme Court to constitute congressional consent in *Barclays* are exactly the same items of inaction relied on by the court of appeal to find congressional consent in this case. If this case and *Barclays* are not subject to the same ultimate disposition, considerable confusion could be generated over the correct standard with which to analyze congressional consent.

REASONS FOR GRANTING THE PETITION

California's use of the worldwide combined method of taxation has been the cause of considerable international controversy and consternation among our foreign trading

partners. The controversy has led to a real and immediate risk of retaliation against U.S.-based multinationals by the United Kingdom which will have a considerable effect on the flow of capital in world markets and discourage U.S. investment abroad. In addition, the court of appeal decision in this case has challenged the very premise of the free trade purposes underlying the Commerce Clause. By inferring congressional consent from congressional silence, the California court has gutted the protection of foreign commerce offered by the Commerce Clause.

Amici believe that these issues alone warrant review by this Court. However, there is an additional consideration of particular concern to *amici,* which consideration will be the focus of this submission.

In seeking to resolve the problem of the United Kingdom retaliatory legislation that is likely to be directed against U.S.-based multinationals, the *amici* are concerned that this Court may subject *amici's* U.S.-based members to an even greater disadvantage. For if the petition is granted in *Barclays* but not in this case, there is a real danger that a discriminatory taxing scheme will be created whereby worldwide combined reporting is declared unconstitutional as applied to a foreign-based group, but not as applied to a U.S.-based group. Not only does the Commerce Clause prohibit application of worldwide combined reporting to domestic-based taxpayers if its application to foreign-based taxpayers is constitutionally prohibited, but also, such discrimination is directly contrary to a longstanding U.S. economic and foreign policy that has been committed to ensuring a level playing field in the international commercial arena. In addition, this case raises *exactly* the same issues as are raised in *Barclays,* and therefore the ultimate disposition of the two cases must be the same.

I. IMPORTANT PRINCIPLES, BOTH CONSTITUTIONAL AND ECONOMIC, REQUIRE THAT U.S.-BASED TAXPAYERS BE TREATED THE SAME AS FOREIGN-BASED TAXPAYERS.

A. The Commerce Clause Requires That U.S.-Based Taxpayers Engaged In Foreign Commerce Be Treated The Same As Foreign-Based Taxpayers Engaged In Foreign Commerce.

Amici believe that if the petition is granted in *Barclays*, the petition in this case must likewise be granted in order to ensure that U.S.-based taxpayers are not subject to a discriminatory taxing scheme by California. Not only would such a taxing scheme violate the free trade principle that has been fundamental to Commerce Clause jurisprudence, but, in addition, such a tax scheme would disregard "sensitive matters of foreign relations and national sovereignty" recognized by the Court in *Japan Line*, that should be left to the federal government.

At the very heart of the Commerce Clause lies the principle of free trade in both a national and an international context. Indeed, this Court has recognized that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod*, 322 U.S. at 330. In upholding this principle, the Court has consistently intervened to prevent discriminatory treatment of "protected" commerce. Therefore, in *Boston Stock Exch.*, this Court struck down a tax statute which preferred one form of interstate commerce over another. In so doing, this Court stated that the "diminution of free competition" that was a result of the discriminatory tax was "wholly inconsistent with the free trade purpose of the Commerce Clause." *Id.* at 336. Similarly, in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court struck down a West Virginia gross receipts tax that discriminated against out-of-state manufacturers, stating that "[i]t long has been established that the Commerce Clause of its own force protects free trade among the

States." *Id.* at 642. *See also Kraft*, 112 S. Ct. 2365 (1992), in which the Court struck down an Iowa statute that treated dividends received from foreign subsidiaries less favorably than those received from domestic subsidiaries.

If this Court finds worldwide combined reporting unconstitutional as applied to foreign-based but not U.S.-based taxpayers, such discrimination would interfere with the very principles of free trade that the Commerce Clause was designed to protect, directly discouraging U.S.-based businesses from investing abroad, and restricting the free flow of capital in international trade. The Commerce Clause therefore prohibits such discriminatory taxation of foreign commerce conducted through U.S.-based groups in favor of foreign commerce conducted through foreign-based groups.[1]

The prohibition against such a discriminatory taxing scheme has already been recognized by members of the Court. In *Container Corp.*, Justice Powell, joined by Chief Justice Burger and Justice O'Connor, made it clear in his dissent that domestic-parent groups cannot be taxed when the taxation of foreign-parent groups is constitutionally barred. *Container*, 463 U.S. at 202. Indeed, Justice Powell called a taxing scheme that so discriminated "unacceptable" because "[i]t would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation." *Container*, 463 U.S. at 203 (Powell, J., dissenting).

In addition, the sensitivity of this Court to discriminatory taxation has been particularly acute in the context of

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[1] This Court has expressly found that domestic-parent groups with foreign operations are engaged in foreign commerce. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 188-89 (1983) ("[T]he tax here falls . . . on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities *engaged in foreign commerce*' . . . this case falls clearly within that reservation." (Emphasis added.)).

foreign commerce. This Court has acknowledged that the "constitutional prohibition against state taxation of foreign commerce is broader than the protection offered to interstate commerce." *Kraft*, 112 S. Ct. at 2370. *See also Japan Line*, 441 U.S. at 446 ("When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required"). This broader protection emanates from the realization that a state, acting unilaterally, might invoke international repercussions that affect the entire nation. As the Court has stated, "a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line*, 441 U.S. at 456. *See also Kraft*, 112 S. Ct. at 2370 ("foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole"). To be sure, "[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).

If worldwide combined reporting is applied only to U.S.-based taxpayers, such discrimination would considerably weaken the credibility and standing of the United States in its dealings with other nations. The United States has consistently held itself out as a champion of free trade and fair dealings in international commerce. Yet it is without doubt that applying worldwide combined reporting only to U.S.-based companies would have a chilling effect on outbound investment and the free flow of commerce. The credibility of the United States federal government would be seriously damaged if it were in the position whereby it was urging removal of trade barriers by other nations at the same time as one of its own states was applying a taxing scheme that so clearly impeded the free flow of commerce in the international arena.

The irony of this situation has already been recognized and commented on by our trading partners. In a letter

to Nicholas Brady, then Secretary of the Treasury from the Right Honourable Mr. Michael Grylls, Member of the British Parliament, dated October 23, 1991, and attached to Petitioner's Opening Brief on the Merits filed in the California Supreme Court on February 24, 1992, Mr. Grylls expressed his opposition to worldwide combined reporting as applied to domestic-based taxpayers. In so doing, Mr. Grylls noted his "concern" as to the effect of worldwide combined reporting on the outbound investments of U.S.-based multinationals and stated that "[m]easures which distort trade flows have been strongly criticised in the current GATT Uruguay round of negotiations, not the least by the United States."

There is a real risk, therefore, that if worldwide combined reporting is constitutionally prohibited only with regard to foreign-based taxpayers, the resulting tax scheme could have implications for the nation as a whole and, as this Court noted in *Japan Line*, "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Japan Line*, 441 U.S. at 453.

B. The Maintenance Of Competitive Balance For U.S.-Based Businesses Has Been A Longstanding Policy Of The Federal Government

Ensuring a level playing field for domestic-based businesses in the international marketplace has been of fundamental importance to this nation's foreign and economic policy. This policy will be directly jeopardized if the Court grants the petition in *Barclays* but not in this case.

The importance to U.S. foreign policy of competitive equality for U.S.-based businesses has been stressed repeatedly by those responsible for conducting U.S. foreign policy. As George Shultz, then Secretary of State, set forth in an official Department of State policy statement:

> The strength of the United States in world affairs, including the achievement of our political and secu-

> rity aims, rests directly upon the foundation of a healthy economy. Particularly important in this regard is our nation's vitality and competitiveness in the international marketplace. Foreign economic and commercial policy is an integral and important element of overall foreign policy.

Policy Statement on Assistance to U.S. Businessmen, Memorandum for All Assistant Secretaries and Bureau Directors, issued May 12, 1987, and *quoted in Congressional Record*, Extension of Remarks, 100th Cong., 1st Sess., Vol. 133, No. 110. Similarly, more recently, a Department of State *Dispatch* reemphasized the federal government's commitment to ensuring competitive equality for American business and outlined a "bill of rights" for American business in the context of the foreign policy carried out by the Department. This includes the right to "[b]e assured that the ground rules for the conduct of international trade are fair and non-discriminatory." Jim Pinkelman, *Department "Gets Down to Business" by Assisting U.S. Firms Promoting American Exports*, U.S. Department of State, *Dispatch*, April 29, 1991, at 306, 306.

The new administration is similarly committed to ensuring a level playing field between domestic-based and foreign-based taxpayers. In his confirmation hearings before the U.S. Senate, Secretary of State Warren Christopher expressed the view of the current administration that "[i]n an era in which economic competition is eclipsing ideological rivalry, it is time for diplomacy that seeks to assure access for U.S. businesses to expanding global markets." Statement at U.S. Senate Confirmation Hearing Before the Senate Foreign Relations Committee on January 13, 1993. To that effect, Secretary of State Christopher has streamlined the Department of State in order "to enhance our capabilities to deal with issues that transcend national boundaries and to improve the international competitiveness of American businesses." *Id. See also* Directive to State Department Employees announcing reorganization dated February 5, 1993, U.S. Department of State, *Dispatch*, February 8, 1993.

Permitting worldwide combined reporting to be applied to domestic-based taxpayers when its application to foreign-based taxpayers is barred would fundamentally undercut the foreign and economic policy of the United States government. This cannot be allowed to happen. If the petition for *certiorari* is granted in *Barclays, amici* urge this Court to grant the petition in this case.

II. IN ORDER TO AVOID DISPARATE TREATMENT OF FOREIGN-BASED AND DOMESTIC-BASED MULTI-NATIONALS, THE ISSUES THAT ARE RAISED BOTH IN THIS CASE AND IN *BARCLAYS* MUST BE SUBJECT TO THE SAME ULTIMATE DISPOSITION.

Like Colgate, the petitioner in *Barclays* is challenging the constitutionality of California's use of the worldwide combined reporting method of taxation. Specifically, the petitioner in *Barclays* has raised the question whether Congress can consent to California's taxing method by remaining silent. If such silence does not constitute consent, *Barclays* has asked this Court whether worldwide combined reporting interferes with the federal government's ability to conduct foreign policy in violation of the dormant Commerce Clause of the U.S. Constitution.

As can be seen in Colgate's petition, these are the very issues raised by this case. Indeed, the question as to whether Congress can consent to a state law by remaining silent and thereby remove that law from the scrutiny of the dormant Commerce Clause, is absolutely identical in both cases. The five items of inaction found by the California Supreme Court to constitute congressional consent in *Barclays* are *exactly* the same items of inaction relied on by the court of appeal to find congressional consent in this case. *See Barclays Bank Int'l, Ltd. v. Franchise Tax Bd.*, 2 Cal. 4th at 733 (1992); *see also* Pet. App.-16a. To be sure, it was because the congressional inac-

tion that was at issue was identical in both cases that the California court of appeal found itself "obligated to adopt the analysis in *Barclays*" that Congress had consented to states' use of worldwide combined reporting. Pet. App.-18a.

If the Court grants the petition in *Barclays,* but does not grant the petition in this case, it could lead to the exact same set of facts being found to constitute congressional consent in one case, and not in another. Not only would this result be constitutionally unacceptable where the only difference between the two cases lies in the domicile of the taxpayer, but also it would result in considerable confusion over whether there is a different standard of congressional consent for domestic-based multinationals than for foreign-based multinationals. If this Court grants the petition in *Barclays,* therefore, it must grant the petition in this case in order to ensure that the ultimate disposition of the two cases is the same.

CONCLUSION

The petition for a writ of certiorari should be granted.

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